



# THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

**WILL WILSON**  
ATTORNEY GENERAL

April 11, 1961

*Overruled  
by M-726  
where conflicts*

Honorable Naomi Harney  
County Attorney of Potter County  
Amarillo, Texas

Opinion No. WW-1036

Re: Whether it is the official  
duty of the County Attorney  
to represent the Sheriff and  
a Justice of the Peace in a  
Civil Suit in Federal Court  
under the facts stated and  
related questions

Dear Mrs. Harney:

Your recent request for opinion has been received and carefully considered by this Department. We quote from your request as follows:

"Jim Line, who was sworn in as Sheriff of Potter County on January 1, 1961, on November 6, 1960, as a citizen, filed a complaint which was taken by Wayne Bagley, District Attorney, against the manager and employees of the State Theatre, charging them under Article 527, showing and exhibiting lewd and lascivious motion pictures; the complaint was filed in Justice of the Peace Court #2 with the Justice of the Peace sitting as an examining court in accordance with Articles 35, 245, etc., Vernon's Texas Code of Criminal Procedure; the Defendants were arrested and brought before the Justice of the Peace Court; the examining trial was waived; they were committed by the Justice of the Peace and bond set by the Justice of the Peace, returnable to the 47th District Court of Potter County; at the time the Defendants were arrested by a Deputy Sheriff, the motion picture films were seized and placed in a safe in the Sheriff's Department where they remain in the possession of Sheriff Line in his official capacity; Wayne Bagley, District Attorney, presented the case to the Grand Jury; the Grand Jury did not No-Bill or present a True-Bill; they wrote a memorandum stating that no action was required by them because it involved a misdemeanor violation, but if there was a criminal violation, then it should be handled by the County Court because of the interest expressed by the public in regard to better movies; no further action has been taken in regard to this matter in any of the State courts. On January 13, 1961, a suit was filed in Federal Court by several movie companies against Sheriff Jim Line and Justice of the Peace Cliff Roberts; they ask for the following relief:

"(1) That the Defendants, their agents, etc. be enjoined during the pendency of the action and permanently from infringing any part of the copy-righted motion pictures.

"(2) That the Defendants be required to forthwith deliver unto Plaintiffs, the motion picture illegally seized which were in their possession and for adjudication as to the question of whether they were lewd, lascivious or depraved.

"The County Attorney represented the Defendants, Sheriff Line and Judge Cliff Roberts. The Court sustained Defendants' Motion to Dismiss for lack of jurisdiction. The Plaintiffs are appealing from this order to the Fifth Circuit Court in New Orleans.

QUESTIONS:

"(1) Is the County Attorney under an official legal duty to represent these Defendants in this appeal?

"(2) If the answer to Question No. 1 is yes, is the Commissioners Court obligated and authorized to pay all the expenses in connection with this appeal including all expenses incurred by the attorney and Court Costs should the case be reversed on appeal?

"(3) If the County Attorney is under no legal duty to represent these Defendants, would the Commissioners Court be obligated and authorized to appoint an attorney, paying his fees and all costs in connection with this appeal?

"(4) The case having been presented to the Grand Jury by the District Attorney, was it the duty of the Grand Jury to either No-Bill or present a Misdemeanor Indictment or was proper action taken when they wrote a statement that if there was a violation then it should be sent to the County Court?

"(5) If the action of the Grand Jury was not proper, would the complaint still be pending before the Grand Jury until the term of Court to which the bonds were returnable ended?"

In reference to your Question Number 1:

The office of County Attorney is established by Article V, Section

21 of the Texas Constitution which provides in part as follows:

"The County Attorney shall represent the State in all cases in the District and inferior Courts in their respective counties; but if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall in such counties be regulated by the Legislature."

Article 26 of the Texas Code of Criminal Procedure deals with the duties of the County Attorney in counties wherein there is a resident District Attorney and in essence gives the County Attorney the duty to represent the State in all cases in the County Court in such counties. Although there are some special statutes which impose other duties upon the County Attorneys we have been unable to find any statute or other law which requires the County Attorney to represent the county or any official thereof upon the appeal of a case. In fact in the case of Brady v. Brooks, 99 Tex. 379, 89 S.W. 1052 (1905) the Supreme Court states that the primary purpose of the District and County Attorneys is: ". . . to prosecute the pleas of the State in Criminal cases." (P. 1056)

In reference to your Question Number 3:

The County has not been made a party to the suit simply because of the fact that some County Officials are being sued. Davis v. Wildenthal, 214 S.W.2d 620 (Civ. App. 1951, error refused n.r.e.). Since the County is not a party to the suit it is neither authorized nor obligated to furnish an attorney for the officials who are being sued.

In reference to your Question Number 4:

Under Article 391, Texas Code of Criminal Procedure, a Grand Jury may return an indictment if it, in its discretion, sees fit to do so. That a Grand Jury may also make recommendations is a well established tradition of our jurisprudence. It therefore follows that the action of the Grand Jury in this case was entirely within their power and was proper.

Since the action of the Grand Jury was proper, your last question, by its terms, need not be answered.

#### S U M M A R Y


It is not the duty of the County Attorney to represent either the Sheriff or a Justice of the Peace in Federal Appellate Court. Since the suit is a suit against the Sheriff and a Justice of the Peace individually, the County

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is not a party and the County is neither authorized nor obligated to furnish an attorney for those two officials. The action of the Grand Jury in refusing to return an indictment and writing a memorandum about the case was within the scope of its power and not improper.

Yours very truly,

WILL WILSON  
Attorney General of Texas

By   
Sam R. Wilson  
Assistant Attorney General

SRW:br

APPROVED:

OPINION COMMITTEE  
W. V. Geppert, Chairman

W. Ray Scruggs  
J. Arthur Sandlin  
Iola Wilcox

REVIEWED FOR THE ATTORNEY GENERAL

BY: Morgan Nesbitt